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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA-CENTRAL AIRLINES CORPORATION,

Petitioner,

vs.

MARJORIE SHOAF DUSKIN, Executrix of the Last Will and Testament of Delmar D. Duskin, Jr., Deceased,

Respondent.

No. 239

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

LOWELL W. TAYLOR,
950 Commerce Title Building,
Memphis, Tennessee,
Counsel for Petitioner.

TAYLOR & QUICK,
J. G. BLANCHARD,
950 Commerce Title Building,
Memphis, Tennessee,
Of Counsel.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Pennsylvania-Central Airlines Corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for

the Sixth Circuit filed April 4, 1948 (R. 61), petition to rehear denied May 24, 1948 (R. 83), which has now become final. The judgment reversed the judgment of the United States District Court for the Western District of Tennessee.

A.

STATEMENT OF THE MATTER INVOLVED

Petitioner is a Delaware Corporation engaged commercially in the interstate transportation of passengers, baggage and mail (R. 4). Delmar D. Duskin was employed by petitioner as a co-pilot operating petitioner's interstate airplanes. His route was over a portion of New York, the full length of Pennsylvania, and portions of Virignia, West Virginia, Tennessee, and Alabama, and on alternate routes over portions of Indiana and Illinois.

He was employed under written contract containing the following provision:

> "All the rights and obligations of the parties hereto shall be governed by the laws of the State of Pennsylvania, including the Workmen's Compensation Act of Pennsylvania." (R. 15).

Duskin was killed in an airplane crash at Birmingham, Alabama. His widow, the respondent here, disregarded the above provision of the contract and sued petitioner in the District Court of the United States at Memphis, Tennessee, seeking to recover damages under the Alabama Employer's Liability Act. She alleged her residence to be in the Western District of Tennessee, and asserted jurisdiction on the ground of diversity of citizenship (R. 3-6).

Petitioner pleaded the above quoted provision of the contract as a bar to her recovery (R. 16).

The District Court sustained the contract and dismissed the suit on motion for summary judgment (R. 50).

The United States Circuit Court of Appeals found that the parties had the right to make the contract, that it was valid in every respect, and that the rights of the parties were governed by it, but held that it did not bar respondent's action because the Pennsylvania Compensation Act did not apply, by its terms, to the accident here under consideration (R. 67-71).

In the course of its opinion the latter court said:

> "The provision in the contract of employment between Duskin and Pennsylvania Airlines, was not contrary to the public policy of Tennessee, the forum —as well as the residence of appellant nor does anything appear in the record, or briefs, or argument, that discloses or suggests that such a provision was contrary to the laws of the District of Columbia where the contract was entered into, or Alabama where the accident took place. It is our conclusion that the provisions in the contract of employment with reference to the application of Pennsylvania laws, were valid in every respect." (R. 67).

The Court then proceeded to hold that, giving full effect to the contract, it did not make the Pennsylvania Statute applicable to the accident in Alabama (R. 67-71).

The District Court held and petitioner's contention is that (a) Duskin was a Pennsylvania employee and that his employment and death came within the purview of the Pennsylvania Workmen's Compensation Act, and (b)

if the statute did not by its terms, and *ex proprio vigore*, extend to the accident in Alabama, the parties had a right to and did make it applicable.

B.

QUESTION PRESENTED

The question presented is:

Whether the Pennsylvania Act applied (a) because Duskin was a Pennsylvania employee accidentally killed while outside the state for less than ninety days, or (b) because the parties agreed that the Pennsylvania Act would apply.*

C.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The United States Circuit Court of Appeals has decided an important question in a way which probably deprives every interstate airline company and every member of the flying personnel of every interstate airline company of the right to execute their enforcible contracts providing for the benefit and protection of workmen's compensation.

It is always contemplated that the flying personnel will fly at tremendous speeds, that they will cross state lines in less than a split second. A motor failure could easily occur in one state and a resulting crash in another. Many kinds of accidents could occur where it would be impossible to prove the state in which the cause originated. It is manifestly to the interests of both the employer

*The pertinent provision of the Pennsylvania Act is quoted in the accompanying brief, page 10.

and employee to have this extremely hazardous question settled and agreed upon.

2. The Circuit Court of Appeals has decided an important question in a way probably affecting an important part of interstate commerce in a way probably in conflict with the applicable decisions of this court.

3. The holding of the Circuit Court of Appeals probably deprives every person in the United States engaged in interstate transportation from fully protecting himself by workmen's compensation. If he cannot contract for that protection there are innumerable instances in which he cannot obtain it at all.

D.

JURISDICTION.

Petitioner is a corporation incorporated under the laws of the State of Delaware. Respondent is, according to the allegations in her complaint, a citizen and resident of Tennessee, and within the jurisdiction of the United States District Court of Tennessee for the Western District. A judgment for more than $3,000.00, exclusive of interests and costs was demanded. The District Court took jurisdiction solely on the diversity of citizenship alleged. The right of review on certiorari is invoked under Section 347, Title 28, U. S. C. A.

E.

PRAYER FOR WRIT.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 10,525, Marjorie Shoaf Duskin, Executrix of the Last Will and Testament of Delmar D. Duskin, Jr., Deceased, Plaintiff-Appellant, v. Pennsylvania-Central Airlines Corporation, Defendant-Appellee"; and that said judgment of said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

LOWELL W. TAYLOR,
950 Commerce Title Building,
Memphis, Tennessee,
Counsel for Petitioner.

TAYLOR & QUICK,
J. G. BLANCHARD,
950 Commerce Title Building,
Memphis, Tennessee,
Of Counsel.

Certificate of Counsel.

I, Lowell W. Taylor, counsel for the above named petitioner, do hereby certify that the foregoing petition for writ of certiorari is presented in good faith and not for delay.

.....

LOWELL W. TAYLOR,
950 Commerce Title Building,
Memphis, Tennessee,
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Respondent.

No. _____

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in holding the Pennsylvania Workmen's Act inapplicable and in reversing the judgment of the District Court.

This was error because (a) Duskin was a Pennsylvania employee not out of the state for more than ninety days,

and (b) the contract, held by both lower courts to be valid and binding, makes the statute applicable.

ARGUMENT.

The amount involved in this case would not justify petitioner in asking this Honorable Court to review if the question involved did not affect the future rights and obligations of every member of petitioner's flying personnel, and this petitioner insofar as they are concerned. The question is even more far reaching than that. If affects every airline doing an interstate business and every member of their flying personnel. If the decision of the Circuit Court of Appeals stands, no pilot, no co-pilot, no hostess, and no other flying employee can ever feel certain that he or she will receive compensation for injuries not due to the negligence of the company. No airline company can ever assume that it can continue to pay compensation to those injured through no fault of the carrier without remaining exposed to the claims of those who assert negligence. The airlines probably are, and surely must be, paying hundreds of thousands of dollars for workmen's compensation insurance for which they receive no protection if the employment contracts be made in one state and the accidents occur in another. Its effect may extend much further. It may affect the right of every employee and every employer engaged in interstate transportation to contract for workmen's compensation.

That workmen's compensation is vitally important to employer and employee is demonstrated by the enactment of a workmen's compensation statute by every state in the Union, the Federal Longshoremen and Har-

bors Compensation Act, and the Compensation Statute for Federal employees.

The opinion of the Circuit Court of Appeals turns on one expression in the Pennsylvania Act. The expression is italicized in the following section of the act quoted in that court's opinion.

> "'Article 1, Sec. 101. That this Act shall be called and cited as the Pennsylvania Workmen's Compensation Act, and shall apply to all accidents occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed or extended, *and shall not apply to any accidents occurring outside of the Commonwealth*, except to accidents occurring to Commonwealth employes outside the Commonwealth while such employes are engaged in duly authorized business of the Commonwealth, and except accidents occurring to Pennsylvania employes whose duties require them to go temporarily beyond the territorial limits of the Commonwealth, not over ninety days, when such employes are performing services for employers whose place of business is within the Commonwealth.' (Pennsylvania Law, 281, approved June 2, 1915, as amended.)" (R. 67-68).

Duskin Was A Pennsylvania Employee.

The District Court held that Duskin was a Pennsylvania employee and covered by the Act. Every element required by the Pennsylvania Statute is present. Petitioner is a Pennsylvania employer with respect to all its Pennsylvania operations. It has not only one, but three places of business in Pennsylvania. Duskin was a Pennsylvania employee with respect to all his Pennsylvania operations.

It is not necessary that the contract of employment be made in Pennsylvania, nor is the Act rendered inapplicable by the fact that the employee was to render services outside the State. **Cookson v. Knauff**, 157 Pa. Super. 401, 43 Atl. (2d) 402 (1945).

Pennsylvania employees are defined by the Pennsylvania Supreme Court to be those who perform the larger portion of their services in Pennsylvania for an employer with a place of business in Pennsylvania, regardless of where the contract was made.

Boch v. Frampton & Co., 161 Atl. 762, 105 Pa. 380 (1932);

Lutz v. State Workmen's Insurance Fund, et al, 124 Pa. Super. 149, 188 Atl. 364 (1936); and

Salkind v. Penn. Threshermen etc. Ins. Co., 335 Pa. 326, 6 Atl. (2d) 301 (1939).

The Circuit Court of Appeals found the following facts:

> "The interstate flight in which Duskin was killed originated in New York. The accident, as has been said, happened in Alabama. However, by far the greater portion of Duskin's flying service was over the state of Pennsylvania, as compared to any other state. Every flight required a junction point stop at Pittsburgh, where appellee has approximately 250 persons currently maintaining and operating one of its bases. Appellee also maintains two other bases in Pennsylvania. During his employment, Duskin flew on his regularly scheduled flights over the whole length of the state of Pennsylvania." (R. 64).

The Act applies, by its terms, to injuries to Pennsylvania employees temporarily out of the State for not more than ninety days. (Article I, Section 101, quoted supra, page 10).

Duskin could not possibly have been outside the State of Pennsylvania for as much as ninety days while acting within the scope of his employment. The "ninety days" means a continuous period of not more than ninety days.

> **Morrison v. Vance**, 157 Pa. 244, 42 Atl. (2d) 195 (1945).

Any doubt as to whether Duskin was a Pennsylvania employee, not out of the state for more than ninety days, necessarily arises from the fact that his duties required him to travel over several states. If he was not a Pennsylvania employee, of what state was he an employee? To overcome that doubt the parties agreed that the Pennsylvania Act would govern. **It is submitted that by the agreement the parties made Duskin a Pennsylvania employee.**

The record shows that the petitioner maintained three places of business in Pennsylvania. It could not do business in that Commonwealth without registering in Pennsylvania in compliance with its foreign corporation statute. Upon so registering it became, for all practical purposes, a resident of Pennsylvania. **Haddonleigh Estate v. Spector Motors**, 41 D. & C. 246. Section 302 of the Pennsylvania Workmen's Compensation Act provides for a conclusive presumption that the parties have accepted the provisions of the Act, unless they give notice to the contrary.

The Parties Intended That The Pennsylvania Act Would Apply To Accidents Outside The State.

Petitioner contends that the Circuit Court of Appeals attempted to reach a literal interpretation of the contract and statute rather than a construction consistent with

the intent of the parties and the spirit of the contract. The result of the holding of the Circuit Court of Appeals is that a contract, held by that court to be valid and binding, means nothing,—that it does not have a spark of vitality.

Duskin did not need a contract for compensation in Pennsylvania if he had been injured or killed there. The statute of that Commonwealth would have applied without a contract. **Pennsylvania Compensation Act,** Article I, Section 101, and **Cookson v. Knauff**, 157 Pa. Super. 401, 43 Atl. (2d) 402 (1945).

The Tennessee Act would not apply to an injury in New York, Pennsylvania, Virginia, West Virignia or Alabama, because the contract of employment was not made in Tennessee. **Williams Tennessee Code,** Section 6870. The Virginia Compensation Act would not apply to an accident in another state for the same reason. **Virginia Workmen's Compensation Act,** Section 37(a). The Alabama Act would not, by its terms, apply to an accident occurring in any other state because it does not cover interstate employees of common carriers. **Alabama Code,** 1940, Title 26, Section 263.

The decisions construing the West Virginia Workmen's Compensation Act leave it extremely doubtful as to whether respondent could have recovered if Duskin had been killed in that State. **West Virginia Compensation Act,** Article 2, Section 1.

The New York Act would not apply to an accident in another state because the contract of employment was not made there, and the employment was not fixed at a

place inside New York. **In the Matter of Tallman v. Colonial Airlines**, 259 N. Y. 512, 182 N. E. 159 (1932).

It would be no answer to say that the compensation act of the state in which the injury occurred would apply. This case refutes that. The Alabama Act does not apply to interstate employees of common carriers.

Petitioner contends that the opinion of the Circuit Court of Appeals cannot be reconciled with the following settled rules:

1. All persons are presumed to know the law. This presumption is even stronger when the parties contract with reference to the laws of a particular state.

Mammoth Oil Co. v. U. S., 275 U. S. 13, 48 S. Ct. 1, 72 L. Ed. 137 (1927); and

Wilber National Bank v. U. S., 294 U. S. 120, 15 S. Ct. 546, 79 L. Ed. 798 (1935).

2. A contract will be construed so as to render it valid and enforcible rather than so as to render it nugatory or meaningless.

Hobbs v. McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940 (1886); and

Great Northern Ry. Co. v. Delmar Co., 283 U. S. 686, 51 S. Ct. 579, 75 L. Ed. 1349 (1931).

3. The cardinal rule in the construction of contracts is to give effect to the intention of the parties in the light of surrounding circumstances.

Bronson v. Rodes, 74 U. S. 229, 7 Wallace 229, 19 L. Ed. 141 (1869); and

Prudential Insurance Co. v. Nelson, CCA 6, 101 F. (2d) 441 (1939).

Giving effect to the first rule above stated, Duskin and Pennsylvania-Central knew the provisions of the Pennsylvania Compensation Statute. They knew that if Duskin be injured or killed in Pennsylvania the compensation law of Pennsylvania would apply without a contract. They knew that, without a contract to the contrary, that Act would not apply in case of accidental injury or death to an employee—who was not a Pennsylvania employee—if the accident occurred outside the State of Pennsylvania. They knew that, without a contract to the contrary, the Pennsylvania Act would not apply to the injury or death of a Pennsylvania employee injured or killed outside the State, where his duties required him to perform services beyond the territorial limits of that commonwealth for a period of more than ninety days. They knew the Pennsylvania Conflict of Laws Rule. In short, Duskin and Pennsylvania-Central knew that, if it be held that Duskin was not a Pennsylvania employee, compensation would not be payable for an accidental injury or death occurring outside the commonwealth in the absence of an agreement that it would be so payable. They knew the limitations, as to extra-territorial effect, embraced within the terms of the Act.

Knowing all the foregoing, they executed and operated under the contract in question. Why?

Did they intend to incorporate in the contract an utterly meaningless agreement? Did they intend, in effect, to say:

> "We know this contract means nothing,—it adds nothing to the applicability of the Act,—but still we are making it."?

Is it not far more reasonable to apply the cardinal rules that (a) in the construction of contracts the Court

will give effect to the intentions of the parties in the light of surrounding circumstances, and (b) so construe the contract as to give it some vitality rather than to render it nugatory and meaningless?

The contract can be held to be effective and to conform to the intention of the parties by holding that the parties knew the limitations of the Pennsylvania Compensation Act and agreed that, despite those limitations, the provisions with respect to payments for accidental injury or death would apply.

In the course of its opinion the Circuit Court of Appeals said:

> "We can only judge the intent of the parties in this case by the terms of the contract itself. But it is to be emphasized that the contract of employment, here in controversy, does not provide that, in case of accident, appellee will pay the amounts provided in the Pennsylvania compensation act. It was only stipulated that the contract be governed by the Pennsylvania Compensation Act and the laws of that state, and we cannot conclude that the intent of the parties was otherwise, or construe their contract to a contrary effect." (R. 69).

One might not be too severely criticized for inquiring, —If the parties did not intend that petitioner would pay the amounts provided by the Pennsylvania Act, what did they mean?

It would be just as reasonable to say that if the parties had agreed to make the Alabama compensation act apply and the accident had occurred in Alabama, compensation would not be payable because the Alabama Act does not, *ex proprio vigore*, apply to employers of common carriers.

The Court of Appeals evidently thought the words "and shall not apply to accidents occurring outside the Commonwealth" in Article I, Section 101, heretofore quoted, prohibited the parties from agreeing to its applicability to accidents in other states. It is not believed that a single member of the Pennsylvania Legislature had any such thought in mind and the Pennsylvania Supreme Court has so held. **Morrison v. Vance**, 157 Pa. 244, 42 Atl. (2d) 195 (1945).

The words "may" and "shall" are not infrequently used interchangeably, and are to be given that meaning which will best express legislative intent.

Hess and Skinner Eng. Co. v. Turney, 109 Tex. 208, 203 S. W. 593 (1918); and

Sisson v. Board of Supervisors, 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440 (1905).

It is not believed that the problem now confronting petitioner and all other interstate airlines and all of their interstate employees could be met by including a schedule of benefits in every employment contract. The first employee with a litigious claim would insist that the agreement was an illegal attempt to limit liability for negligence.

If respondent had sued on the contract asserting her right to compensation under the Pennsylvania Act and petitioner had denied liability, what court would have denied her claim?

WHEREFORE, petitioner prays that the writ be issued.

LOWELL W. TAYLOR,
950 Commerce Title Building,
Memphis, Tennessee,
Counsel for Petitioner.

TAYLOR & QUICK,
J. G. BLANCHARD,
950 Commerce Title Building,
Memphis, Tennessee,
Of Counsel.